No. 14860

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

MICHAEL GLENN, a minor, by and through his Guardian *ad litem,* IDA MAE GLENN,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

PETITION FOR REHEARING.

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Plaintiff and Appellee respectfully petitions the Court for a rehearing on the following grounds:

1. It cannot be clearly determined from the majority opinion what is the basis for the holding that the disability provisions of U. S. C. section 2401 does not apply to actions in tort against the government. The opinion states that "it is not clear that the sentence in (a) qualified the limitation on tort claims set forth in (b)" and that therefore other indications of Congressional intention must be looked to. The only indications of Congressional intention to which the opinion refers, however, are that "there is no presumption that by a revision which lifts two

limitation clauses out of respective context, rewords them a little, and sets them down with separate sublettering in a separate limitations section that the whole of the two were intended to be commingled," that "there is no committee report and no Congressional colloquy or debate that sustains the position of plaintiff-appellee," and that "the reviser's notes which purported to pinpoint substantial changes in the judicial code are silent on any intent to have any tolling provision wash into the Federal Tort Claims Act." The sum and substance of these statements is that there is no substantial evidence of Congressional intention other than the statute itself. The court in effect says: "The meaning of the statute is not clear therefore we must look to other evidence of Congressional intent. There is little or no other evidence of Congressional intent, therefore we hold that the disability provision of subsection (a) does not apply to subsection (b)." This conclusion does not follow from the prior statements. In the absence of more definite evidence of Congressional intention, the Court must return to the language of the statute itself and determine what is the proper interpretation of the actual language used. This the Court has expressly refused to do.

2. The opinion does not consider the fact that the new section 2401 does not consist merely of the old sections placed together in one location, but that on the contrary section 2401 contains new language which differs in material respects from the language of the old sections. In particular, the wording of subsection (a) of 2401 provides for tolling of the statute of limitations during disability on *all actions* brought against the government *whether contract or tort* as distinguished from the old section 4120 which applied only to contract actions.

3. The opinion does not give consideration to the fact that subdivisions (a) and (b) are but component parts of a single section which must be construed together as a unit rather than as if each subsection was a section separate unto itself.

4. The opinion does not consider the fact that the reviser's notes under section 2401 make specific reference to the notes under section 2501, which section contains similar provisions with regard to actions brought in the Court of Claims, and that the notes under section 2501 state in part: "The revised language will cover all legal disabilities actually barring suit . . . Also persons, under legal disability could not sue, and their suits should not be barred until they become able to sue," which statement offers specific evidence of a policy not to bar from suit persons under a disability.

5. The opinion does not consider in any way the meaning or effect upon the question presented of section 2674 which provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." Since the statute of limitations on tort claims against private individuals is ordinarily tolled during the disability of the plaintiff, this section indicates an intention on the part of Congress to have a similar policy apply with regard to the government.

6. Finally, the opinion does not discuss in any manner Appellee's contention, set forth under II. of Appellee's Brief, that under the decisions of the Federal Courts including cases against the government a statute of limitations, as distinguished from a substantive condition, is ordinarily tolled during disability or fraud of the plaintiff,

even in the absence of an express provision to this effect. In particular, the opinion gives no consideration to the case of *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253 at 258-9 holding that the period for bringing suit under the Federal Employers Liability Act is tolled by fraud even in the absence of an express provision to this effect and stating that the "infinite variety" of human experience would disclose other circumstances which would justify tolling the time limitation for bringing suit even in the absence of an express provision in the statute.

Appellee further respectfully suggests that the matter should be heard and decided by the full court in banc because of the importance of the question involved and the fact that it has not heretofore been passed upon by any Appellate Court.

Respectfully submitted,

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LEONARD G. RATNER,
By LEONARD G. RATNER,
Attorneys for Appellee.

Certificate of Counsel.

I, Leonard G. Ratner, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

LEONARD G. RATNER,
Attorney for Petitioner.